

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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STEPHEN ACHEAMPONG, *et al.*,

Case No. 2:15-cv-00981-RFB-PAL

Plaintiffs.

SUPPLEMENTAL ORDER

v.

LAS VEGAS VALLEY WATER DISTRICT,
et al.,

Defendants.

Before the Court is Plaintiffs' Motion for Clarification of the Order Dated March 30, 2018, ECF No. 106. The Court grants Plaintiffs' motion and provides this Supplemental Order clarifying its March 30, 2018 Order (ECF No. 102). The Court incorporates the Order in its entirety by reference, including all relevant facts and legal standards.

The Court acknowledges that Plaintiffs Stephen Acheampong, Paul Jahn, and Nikolas Taranik were inadvertently excluded from its earlier Order. For the reasons discussed below, the Court now grants in part and denies in part the Motion for Summary Judgment (ECF No. 47) as to these three Plaintiffs. The Court notes at the onset that by only choosing to defend their ADEA and Promissory Estoppel claims, Plaintiffs abandon their other claims.

The Court also re-addresses the claims of Plaintiffs Cynthia Pridgen and Richard Wilson. In reviewing its Order to address Plaintiffs' instant Motion for Clarification, the Court realized it erred in its assessment of these claims. Based upon its inherent procedural power to modify an interlocutory order for cause, City of L.A. v. Santa Monica BayKeeper, 254 F.3d 882, 885 (9th Cir. 2001), the Court now grants the Motions for Summary Judgment against Plaintiffs Pridgen (ECF No. 49) and Wilson (ECF No. 53).

1 **I. Factual Findings – Acheampong, Jahn, Taranik**

2 The Court incorporates by reference its previous findings, except where otherwise noted.
3 The Court also makes the following findings of fact for each plaintiff.

4 **A. Plaintiff Acheampong**

5 ***1. Undisputed Facts***

6 Plaintiff Acheampong was hired in 2001 and employed by the Water District at the time
7 he was terminated. Acheampong holds a Bachelor of Science in Geological Engineering from
8 Ghana, West Africa, a master's degree in Geoscience with Hydrology Concentration from the
9 University of Nevada Las Vegas, and a Ph.D. in Hydrology/Hydrogeology from the University of
10 Nevada, Reno. Acheampong was over the age of 40 when he was included in the RIF and had
11 received only Exceeds Full Performance or Full Performance marks on his yearly employee
12 evaluations. Acheampong received the Handbook when he was hired.

13 Acheampong was responsible for gathering hydrology data from the field, interpreting and
14 analyzing the data, and writing up reports. By 2014, Acheampong oversaw aqueous geochemistry
15 and water quality for the Water Resources Division. Acheampong designed water quality
16 sampling programs, coordinated with laboratories for analytical services, and analyzed the data
17 generated and wrote reports and gave recommendations to management.

18 It is undisputed that Andrew Burns was Acheampong's supervisor, that Burns was involved
19 in deciding which employees would be included in the RIF, and that Burns at least joked about the
20 age of his work group occasionally.

21 ***2. Disputed Facts***

22 It is disputed whether the Water District continues to perform all of Acheampong's former
23 job functions since his termination or whether the project upon which Acheampong primarily
24 worked was indefinitely deferred. It is disputed whether Acheampong was included in the RIF
25 because he did not have expertise in the field methods needed to support the department's focus
26 for the future or because of his age.

27 The District neither refutes nor concedes that Burns made several comments about
28 Acheampong's age, including the following specific comments: (1) telling Acheampong he had to

1 use the bathroom frequently after his prostate surgery because he was old; (2) telling a group of
2 employees including Acheampong that they belonged in a geriatric ward; and (3) writing the
3 following handwritten comment on a memo by Acheampong: “Steve – I know you’re old and I
4 apologize for writing my comments so small, but I had so many.”

5 **B. Plaintiff Jahn**

6 *1. Undisputed Facts*

7 Plaintiff Jahn was hired in 2005 and employed by the Water District at the time he was
8 terminated. He was supervised by Burns. Jahn holds a bachelor’s degree in Environmental Studies
9 and a master’s degree in Physical Geography. Jahn was over the age of 40 when he was included
10 in the RIF and had received only Exceeds Full Performance or Full Performance marks on his
11 yearly employee evaluations. Jahn received the Handbook.

12 Jahn was responsible for keeping track of samples and maintaining a water-quality
13 database. Jahn also submitted the annual quality report to the State of Nevada.

14 It is undisputed that Burns was Jahn’s supervisor, that Burns was involved in deciding
15 which employees would be included in the RIF, and that Burns joked about the age of his work
16 group.

17 *2. Disputed Facts*

18 It is disputed whether the need for Jahn’s work supporting field data collection was
19 significantly reduced and whether the need for Jahn’s data entry was eliminated by automated
20 upload processes. It is disputed whether Jahn was included in the RIF because the need for his
21 work was largely eliminated or because of his age.

22 In addition to the previous alleged comments attributed to Burns, the District neither refutes
23 nor concedes that Burns made comments about Jahn’s age, such as commenting that Jahn and
24 other employees were old and “over the hill.”

25 **C. Plaintiff Taranik**

26 *1. Undisputed Facts*

27 Plaintiff Taranik was hired in 2008 and employed by the Water District at the time he was
28 terminated. He was supervised by Burns. Taranik holds a Bachelor of Science in Geology and a

1 Master of Science in Geosciences with concentrations in hydrology and hydrogeology. Taranik
2 was over the age of 40 when he was included in the RIF and had received only Exceeds Full
3 Performance or Full Performance marks on his yearly employee evaluations. He received a copy
4 of the Handbook when he was hired.

5 Taranik was part of the Resource development group and was the QA/QC lead for the Data
6 monitoring group, performing hydrologic duties of water monitoring and exploration of water
7 resources. He oversaw the quality assurance and quality control to make sure the monitoring data
8 was correct and reported to the State of Nevada Water Resources Division in Carson City.

9 It is undisputed that Burns was Taranik's supervisor, that Burns was involved in deciding
10 which employees would be included in the RIF, and that Burns joked about the age of his work
11 group.

12 ***2. Disputed Facts***

13 It is disputed whether Taranik's section within the Water Resources Division was
14 disbanded and his projects deferred and completed. It is disputed whether Taranik was included
15 in the RIF because no further work was anticipated for him or because of his age.

16 Again, in addition to the previous alleged comments of Burns, the District neither refutes
17 nor concedes that Burns made comments about Taranik's age and that he told a group of employees
18 including Taranik that they were the geriatric crew.

19 **II. ADEA Disparate Treatment Claims – Acheampong, Jahn, Taranik**

21 As to the prima facie case, the District does not dispute Plaintiffs' status within their alleged
22 protected classes, satisfactory job performance, or discharge as part of the RIF. The District argues
23 only that Plaintiffs have failed to show circumstantial, statistical, or direct evidence that their
24 discharges occurred under circumstances giving rise to an inference of age discrimination.

25 Plaintiffs "need produce very little evidence of discriminatory motive to raise a genuine
26 issue of material fact." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998). Here,
27 Plaintiffs provide declarations stating that Burns, who supervised Plaintiffs and was involved in
28 the decision to include them in the RIF, made several comments about Plaintiffs' age. ECF No.

1 60, Ex. A, pgs. 2-3; Ex. B, pg. 2; Ex. C, pg. 2. Though Plaintiffs identify certain specific
2 derogatory comments, they also allege that Burns was generally known to make frequent
3 inappropriate comments about his employees' age. ECF No. 60, Ex. C, pg. 2.

4 The District argues that even if Burns made the alleged comments, they are alone
5 insufficient establish the fourth element of a prima facie age discrimination case because they are
6 stray comments made in jest. However, Burns' alleged comments were age-related, negative,
7 directed at his employees in the workplace and during the performance of work, and made
8 repeatedly. The totality of the undisputed and disputed facts, including the alleged repeated
9 negative age-related comments, raise a genuine issue of material fact as to the basis for the
10 terminations of Acheampong, Jahn and Taranik. See E.E.O.C. v. Boeing Co., 577 F.3d 1044, 1050
11 (9th Cir. 2009) (reversing summary judgment where supervisor "frequently made demeaning and
12 derogatory comments about women").

13

14 III. Promissory Estoppel Claims – Acheampong, Jahn, Taranik

15 Plaintiffs argue that they relied on promises Defendant made in its Employee Handbook to
16 follow certain procedures in the event of a layoff, including laying employees off in order of
17 seniority. As the Court discussed with regard to Plaintiff Pridgen, the handbook states that
18 employment is "subject to termination at any time for whatever reason." The handbook states that
19 it will "generally" lay employees off in order of seniority but creates an exception when "business
20 needs dictate otherwise." Plaintiffs have not raised a genuine issue of disputed fact as to how their
21 termination did not satisfy the business needs of the District to reduce its workforce.

22

23 IV. ADEA Disparate Treatment Claims – Pridgen, Wilson

24 In finding that Pridgen and Wilson had each established a prima facie case of age
25 discrimination, the Court erroneously determined that Plaintiffs needed only to allege that the type
26 of work for which they were responsible continued after their termination. The Court referenced
27 Merrick v. Hilton Worldwide, Inc. for the principle that an inference of age discrimination "may
28 be established by demonstrating that an employer had a continuing need for [the plaintiff's] skills

1 and services in that [his] various duties were still being performed.” 867 F.3d 1139, 1146 (9th Cir.
2 2017) (citation and internal quotation marks omitted) (alterations in original). However, upon
3 further review, the Court recognizes that in Merrick and other Ninth Circuit cases, the plaintiff still
4 must show either (a) evidence that a younger employee took over at least some of the plaintiff’s
5 duties or (b) statistical evidence, even if weak, giving rise to an inference of age discrimination.
6 See id. (prima facie case satisfied where the defendant hired a new employee, fifteen years younger
7 than the plaintiff, who took over some of the plaintiff’s duties); Coleman v. Quaker Oats Co., 232
8 F.3d 1271, 1281 (9th Cir. 2000) (prima facie case satisfied where statistical evidence, though
9 problematic, arguably showed that older workers were terminated at twice the rate of younger
10 workers).

11 Here, Pridgen and Wilson offer neither evidence of younger employees taking over their
12 job responsibilities nor statistical evidence that the District targeted older employees. They offer
13 nothing beyond their own assertion that their job functions continued to be performed at the
14 District after their termination. Even if credited as true, no precedent stands for the principle that
15 the mere continuance of a terminated employee’s job functions can constitute circumstantial,
16 statistical, or direct evidence that the employee’s discharge occurred under circumstances giving
17 rise to an inference of age discrimination. The fact that an employer continues to produce work
18 formerly performed by the terminate employee does not speak to the question of why an employee
19 was terminated and whether the termination was based in any part on age discrimination.

20

21 Accordingly,

22 **IT IS ORDERED** that Plaintiffs’ Motion for Clarification of Order (ECF No. 106) is
23 **GRANTED**.

24 **IT IS FURTHER ORDERED** that Defendant’s Motion for Summary Judgment Against
25 Plaintiffs Stephen Acheampong, David Donovan, Nikolas Taranik and Paul Jahn (ECF No. 47) is
26 **DENIED** as to Plaintiffs Acheampong, Jahn, and Taranik’s ADEA disparate treatment claims.

27 **IT IS FURTHER ORDERED** that Defendant’s Motion for Summary Judgment Against
28 Plaintiffs Stephen Acheampong, David Donovan, Nikolas Taranik and Paul Jahn (ECF No. 47) is

GRANTED as to all other claims by Plaintiffs Acheampong, Jahn, and Taranik.

IT IS FURTHER ORDERED that the Court's March 30, 2018 Order (ECF No. 102) is modified in part, such that Defendant's Motion for Summary Judgment Against Plaintiff Cynthia Pridgen (ECF No. 49) and Defendant's Motion for Summary Judgment Against Plaintiff Richard Wilson (ECF No. 53) are now **GRANTED**. The Clerk of Court shall enter judgment accordingly against these plaintiffs.

DATED: November 1, 2018.

BR

**RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE**